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NOTES.

EX POST FACTO LEGISLATION.—The term *ex post facto* laws, in the literal sense of laws passed after the act done, is comprehensive enough to include all retrospective laws, whether civil or criminal.[1] It has long been established, however, though not without some dissent,[2] that the phrase as used in the Constitution[3] applies only to legislation punishing as criminal, acts committed before it went into effect.[4] It was so limited in the first decision of the United States Supreme Court on the subject,[5] in which case Mr. Justice Chase formulated the first

[1] 2 Story, Commentaries on the Constitution, § 1345.

[2] Johnson, J., in Satterlee *v.* Matthewson (1829) 2 Pet. 380. 416.

[3] Art. 1, §§ 9-10.

[4] Calder *v.* Bull (1798) 3 Dall. 386; 1 Kent, Comm., 409; see Cooley, Const. Lim., 373. The deprivation of the privilege of following a profession unless certain tests are complied with, is a punishment, and may be *ex post facto.* Cummings *v.* Missouri (1866) 4 Wall. 277; *cf.* Hawker *v.* New York (1898) 170 U. S. 189, distinguishing Cummings *v.* Missouri on the ground that the test required there had no relation to the qualification for the profession, and holding a statute to be a valid exercise of the police power which provided that no one who had been convicted of a felony should practice medicine.

[5] Calder *v.* Bull, *supra.*

judicial definition of an *ex post facto* law within the constitutional prohibition as follows: "(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. (2) Every law that aggravates a crime, or makes it greater than it was when committed. (3) Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. (4) Every law that alters the legal rules of evidence and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Although this definition has been stated in more comprehensive terms,[6] its classification has been uniformly approved by federal and state courts alike.[7] The conflict, where any is found, is in the application of these rules to the facts of individual cases.

Courts generally are in accord in declaring that a statute which clearly adds an increase in punishment to that prescribed when an act was done is *ex post facto* as to that act;[8] and one which remits a portion of the punishment is just as clearly not within the prohibition.[9] Further, a change in the rules of evidence, operating to deprive the accused of the advantages secured him by our system of criminal procedure, is just as generally held to be objectionable.[10] But when the character of the change is not so apparent on its face, we find some difference in the tests applied to determine the validity of the legislation. Some courts rely solely on the test as to whether, in their opinion, the new punishment is an aggravation of the old.[11] On the

[6]A law is *ex post facto* which "in relation to the offense, or its consequences, alters the situation of the party to his disadvantage." United States *v.* Hall (1809) 2 Wash. C. C. 366, 373.

[7]Mallett *v.* North Carolina (1901) 181 U. S. 589, 593; Hartung *v.* People (1860) 22 N. Y. 95, 104; State *v.* Johnson (1867) 12 Minn. 476, 484.

[8]Thus a statute adding to punishment by death, imprisonment for one year in solitary confinement, Medley, Petitioner (1890) 134 U. S. 160, or raising the minimum term of imprisonment, Flaherty *v.* Thomas (Mass. (1866) 12 Allen 428, or depriving of the right to reduce sentence by good behavior, People *v.* Johnson (N. Y. 1904) 44 Misc. 550, or increasing the costs in criminal actions when non-payment is ground for additional punishment, Caldwell *v.* State (1876) 55 Ala. 133, may be *ex post facto*. But a change in prison discipline, though it may enhance the severity of the confinement to some extent, is not *ex post facto*. Storti's Case (1901) 180 Mass. 57.

[9]People *v.* Hayes (1894) 140 N. Y. 484.

[10]Kring *v.* Missouri (1882) 107 U. S. 221; United States *v.* Hughes (1875) Fed. Cas. 15416; Hart *v.* State (1866) 40 Ala. 32; State *v.* Johnson, *supra*. But a change of procedure is not *ex post facto*, Hopt *v.* Utah (1884) 110 U. S. 574; Thompson *v.* Missouri (1898) 171 U. S. 380; People *v.* Qualey (1914) 210 N. Y. 202; unless it takes away a substantial right, such as the right to trial by a common law jury secured by the Constitution to a citizen of a territory of the United States. Thompson *v.* Utah (1898) 170 U. S. 343.

[11]A change from death to life imprisonment, Commonwealth *v.* Wyman (Mass. 1853) 12 Cush. 237; McGuire *v.* State (1898) 76 Miss. 504; or a change from whipping not exceeding a hundred strokes to imprisonment not exceeding seven years, Strong *v.* State (Ind. 1822) 1 Blackf. 193; have been held valid as mitigating the punishment. *Cf.* Clarke *v.* State (1852) 23 Miss. 261; Herber *v.* State (1851) 7 Tex. 69.

other hand, in the case of *Hartung* v. *People*,[12] the New York court adopted the rule that it is enough to bring the law within the condemnation of the Constitution that after the commission of the offence it substitutes a different penalty; and that it is not for the court to say that in a given case it would increase or mitigate the severity of the punishment. Although this decision has been affirmed,[13] it has, perhaps, been qualified somewhat by a dictum in a later case to the effect that the mere fact of an alteration in the manner of punishment, without reference to mitigation, would not necessarily render an act obnoxious to the constitutional provision.[14] It has, however, been approved by other courts.[15]

The point under discussion was involved in the recent case of *Malloy* v. *State* (U. S. Sup. Ct., Oct. Term No. 172, April 5, 1915), not yet reported, where it was held that a law of South Carolina changing the method of inflicting the death penalty from hanging to electrocution was not *ex post facto*. The court there seemed to apply both tests, deciding that the form of the punishment was not changed, or if it could be said that a new punishment was substituted, it was a mitigation of the old form. So while it is difficult to formulate a rule which will entirely reconcile all the cases, it seems that the policy of our criminal law could best be maintained by saying that a clear aggravation of punishment is unquestionably *ex post facto*; and where the character of the change is not apparent, though it should not be arbitrarily held objectionable, the accused should be given the benefit of the doubt, and the new form be presumed to be an aggravation until the contrary is shown.

RIGHTS OF THE HALF BLOOD IN DESCENT AND DISTRIBUTION.—There are several States at the present day where no distinction whatsoever is made between relatives of the half and whole blood with regard to the descent and distribution of an intestate's property.[1] There are also some that do not show any discrimination in disposing of a decedent's personal estate.[2] But in all the others,[3] the rights of persons

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[12]*Supra.* It is to be noted, however, that the court also held the law in question to be *ex post facto* on the ground that it was an aggravation of punishment, and this has been held as to similar legislation elsewhere. Medley, Petitioner, *supra.*

[13]Shepherd *v.* People (1862) 25 N. Y. 406.

[14]See People *v.* Hayes, *supra,* p. 492, distinguishing Hartung *v.* People and Shepherd *v.* People on the ground that the alteration in those cases was not merely in the manner of punishment.

[15]State *v.* McDonald (1873) 20 Minn. 136; see *In re* Petty (1879) 22 Kan. 477; State *v.* Willis (1877) 66 Mo. 131, 136.

[1]Carter *v.* Carter (1908) 234 Ill. 507; Larrabee *v.* Tucker (1875) 116 Mass. 562; Mass. R. L. 1902, c. 133, § 2; Kan. Gen. Stat. 1909, c. 33, § 2962; Ore. Gen. Laws. Tit. XLVIII, c. VII, § 7353; Hatch *v.* Hatch (1849) 21 Vt. 450; Wash., 1 Rem. & Ball. Ann. Code, Tit. X, c. VI, § 1347.

[2]Deadrick *v.* Armour (1850) 29 Tenn. 588, 598; Pa. Intestates, 21; N. Y. Decedent Estates Law, § 98 (13); Md. Code 1904, Art. 93, § 130; *et. al.*

[3]And in jurisdictions such as those of the preceding note with regard to real estate.